No Defense for the "Nuclear Option"

Response to Harvard Journal of Law and Public Policy Article

People For the American Way Foundation
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Introduction

Advocates for the "nuclear option" who read closely the recent Harvard Journal on Law and Public Policy[1] article entitled: *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster,* will be disappointed.[2] The article, appearing in the self-described conservative/libertarian journal, provides no historical support for Senate Majority Leader Bill Frist's push for judicial Armageddon on the floor of the United States Senate.

It even directly rebuts assertions by Senator Frist, Senator Orin Hatch, Senator Trent Lott, and others that recent Democratic filibusters which blocked up-or-down votes on judicial nominees are unprecedented. The authors' definition of the filibuster includes actions such as "placing a hold on a bill or nomination, [and] refusing to report a bill or nomination out of Committee."[3] Under this definition, Senator Hatch, as chair of the Senate Judiciary Committee, along with some of his Republican colleagues, are themselves responsible for "filibustering" over 60 of President Clinton's nominations between 1995 and 2000.

Ultimately, while the authors extensively review historical debates on changing Senate rules and precedents, they fail to show that there is any precedent for allowing a bare majority of the Senate to invoke the nuclear option to end the use of filibusters against judicial nominations, And they ignore the more important question: whether the Senate should take such a dramatic step.[4]

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[1] Martin B. Gold, Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster,* Harvard Journal of Law and Public Policy, Volume 28, Issue 1 (2004) (hereinafter Gold,Gupta).

[2] The "nuclear option" refers to a narrow majority of the Senate circumventing the Senate's rules and declaring that a simple majority can cut off debate on a judicial nominee. Under the Senate's written rules, 60 votes are necessary to end a filibuster – forcing compromise and curbing extremism. And on the weighty matter of changing its own rules, the Senate requires a two thirds vote to end debate.

[3] Gold, Gupta at 211.

[4] Moreover, while supporters of the nuclear option claim that it is a precision tool intended only to wipe out the filibuster for judicial nominations, not legislation, in fact, every example cited in the Gold/Gupta article, save one (the 1980 "precedent" discussed at pp.7-8), involved legislation.

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Discussion

The article lays out two possible scenarios for the nuclear option (which the authors refer to as the "constitutional option"). The first route, which runs directly counter to the plain language of Senate Rule V.2[5], involves ending the practice of the Senate operating as a continuing body, inducing a simple majority of the Senate to vote that the existing cloture rule no longer binds the Senate, and proceeding to adopt a new rule XXII that would allow a simple majority of the Senate to cut off debate on a nomination. The second route consists of engineering a vote on the interpretation of rule XXII in the context of a debate on a specific judicial nomination and having the Senate, in effect, rewrite the rule by adopting a precedent that directly conflicts with its text.[6]

While the instruments may be slightly different, the tune is the same. Both options involve, either literally or in effect, amending rule XXII outside of the normal process for changing the Senate's rules. Both options also involve the Senate adopting new precedents that the body has heretofore expressly rejected or at a minimum never adopted. And both options would set the precedent for allowing a simple majority to set the terms of debate on any question before the Senate – essentially transforming the Senate into the House of Representatives by effectively adopting the process used by the House of Representatives to govern debate.

Nuclear Option No. 1: Seeking to "Amend Formally the Standing Senate Rules"

Over half of the Gold/Gupta article is devoted to describing the Senate's history of sporadic, unsuccessful attempts to reject the proposition that the Senate's rules continue from one Congress to another. The theory advanced was that the supermajority requirement to end debate on a change to the Senate's rules makes it difficult to amend the cloture requirement. If the Senate were to act before a new Congress was formally organized, the authors theorize, the formal process for amending the standing rules of the Senate would not apply because that process is established by the rules themselves. Operating under "fundamental rules of parliamentary procedure"[7] a simple majority allegedly could cut off debate on a new cloture rule that establishes a lower threshold for cutting off debate.

Over the course of 43 pages, the advocates' arguments get thorough treatment. But the authors are ultimately forced to admit that the Senate has squarely rejected the notion that the Senate and its rules are not continuing every single time the issue came to a vote.[8] In fact, over its entire 216-year history the Senate has operated as a continuing body whose rules do carry over from Congress to Congress. The Senate has only re-adopted or re-codified its rules at the start of a

[5] Senate Rule V. 2, which is discussed at p.3, provides that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."
[6] The article also mentions a third method: adopting a standing order by resolution. However, this option has not been raised as a possible avenue for ending the filibuster and is procedurally different than the nuclear option. Such a resolution would generally be fully amendable and debatable on the Senate floor. As a result, it is likely a less attractive option for Frist to employ and it is not discussed in this memo.
[7] Gold, Gupta at 244-245. "Fundamental rules of parliamentary procedure" are ill-defined, but apparently something like Robert's Rules of Order is contemplated. How such rules are "fundamental" or are more legitimate than the Senate's own rules is not answered.
[8] *Id*. at 260.

new Congress seven times.[9] Finally, to remove any doubt, in 1959 the Senate went further and added clause 2 to rule V, which states that: "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." During the Senate's consideration of the change, which also reduced the threshold for achieving cloture,[10] the Senate rejected two amendments aimed at striking the addition of clause 2 to rule V. [11]

The tradition of the Senate as a continuing body was affirmed in a 1978 interview by the esteemed former Senate Parliamentarian Floyd Riddick, whose authoritative compilation of Senate precedents is still the reference in use today by the Senate.[12] It has also been recognized on several occasions by the U.S. Supreme Court.[13]

The authors of the article make much of the fact that attempts to end the practice of the Senate carrying over its rules were occasionally followed by the Senate amending the cloture rule under the "regular order." But in each case, Senators abandoned this nuclear-like tactic – with all its dangers and potential for collateral damage to the institution of the Senate – and, with bipartisan support, made the desired changes "by the book" and in accordance with Senate rules. It would therefore be a mistake to draw the conclusion from these episodes that the nuclear option could be appropriately or usefully threatened by Senator Frist to achieve a similar result on judicial filibusters.

For example, the article describes in great detail how in January 1959 the Senate adopted a change in the Senate cloture rule by adopting a resolution sponsored by Senate Majority Leader Lyndon Johnson on a vote of 70-22. The Johnson resolution was offered at the beginning of the 86th Congress after efforts were made to end the continuing body practice in the 85th Congress. Prior to adopting the Johnson resolution, the Senate tabled an effort to use the nuclear-like tactic on a vote of 60-36. Opponents of this effort expressly argued that while they supported making it easier to invoke cloture, given the choice they would prefer to "avoid the potential chaos" inherent in the nuclear-like method.[14]

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[9] Floyd M. Riddick, Alan S. Fruman, p. 1220

[10] Under the amended rule XXII, cloture could be invoked by 2/3 of the Senators present and voting instead of chosen and sworn.

[11] *See* Gupta, Gold at 247.

[12] Interview of Floyd Riddick, found at http://www.senate.gov/artandhistory/history/resources/pdf/Riddick_interview_4.pdf. When asked whether there was historical support for treating the Senate as a continuing body, Riddick responded, "[I]f you go back and read a lot of the literature as I have, for example, and compile your findings which have never been printed, but which is a compilation from the early years of the Senate until today, including senators who later became presidents or moved to other high offices, you will find it is not new nor artificially devised. So many of them have said the Senate was absolutely a continuing body in every respect. That was the intent of the fathers of the Constitution when they provided that only one third of the senators would come up for election every two years. It made the Senate have a two-thirds membership at all times, under all circumstances. As they said, the Senate was an everlasting institution, that there was no break. Supreme Court decisions have been cited to that effect; cases concerned with committees citing people for contempt when the Senate was not in session; the Supreme Court has held more than once that the Senate unlike the House is a continuing body." *Id*. at 131-132.

[13] *U.S. 491, 512 (1975); U.S. 135, 181 (1927).*

[14] *See* Gupta, Gold at 242 describing argument made by Senator Pastore.

In 1975, a group of Senators asserted that the Senate's rules had not carried over from the previous Congress and therefore the existing cloture rule was no impediment to adopting a motion to end debate by majority vote. Such a motion was offered that, in addition to other things, would have brought to a close the debate on a motion to proceed to an amendment to the Senate's rules. Complex parliamentary wrangling ensued.[15] The authors interpret some of the votes tabling points of order during this episode as endorsements of the nuclear option.

However, one thing is clear: *debate on the motion to proceed to consideration of the resolution changing the Senate rules was <u>never</u> brought to a close by the vote of a simple majority.* Then-Majority Leader Mike Mansfield stated that he supported reducing the cloture threshold, but he opposed the nuclear option as a means.[16] As before, once a compromise resolution was offered and adopted by the Senate which lowered the cloture threshold, support for the nuclear-like option evaporated. The Senate ultimately voted 53-43 to sustain the original point of order raised against the majority-vote cloture motion. During an earlier attempt to exercise this variant of the nuclear option in 1953, renowned Republican Majority Leader Robert Taft foreshadowed Mansfield's later opposition. As the article describes, Taft argued vigorously that "he did not object to filibuster reform—he also wanted to see Rule XXII 'changed and liberalized somewhat'—but to the 'radical' process…proposed for achieving it."[17]

In contrast to these earlier episodes which reflected a "twenty-two year" bipartisan effort to change the rules,[18] Senator Frist's effort is clearly driven by short-term, partisan maneuvering. Not a single member of the Senate minority is likely to support it.

On the contrary, Frist has his hands full stemming a growing tide of Republican opposition to and concerns about his plan. For example, Senator John Warner has expressed deep skepticism: "I tend to be a traditionalist, and the right of unlimited debate has been a hallmark of the Senate since its inception."[19] And many others like Senator John McCain have expressed concerns: "I think there is a reason why we're bicameral; the Senate should not be like the House."[20] In mid-February, Senator Snowe said, "I don't think we should move in that direction [the nuclear option]. I don't think it'll be optimal for the environment." [21] And there is growing popular and editorial opposition as well: Over 150 newspaper editorials from around the country have been written in opposition to the nuclear option in recent months and a January Wall Street Journal/NBC poll found that the public supports retaining the filibuster 48%-39%. As conservative columnist George Will has recently written: "The filibuster is an important defense of minority rights, enabling democratic government to measure and respect not merely numbers but also intensity in public controversies. Filibusters enable intense minorities to slow the governmental juggernaut. Conservatives, who do not think government is sufficiently inhibited,

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[15] For a more detailed discussion, see PFAW memorandum: *Proponents of a "Nuclear" Strategy to Force Changes in the Senate filibuster Rules Misrepresent What Happened When the Rules Were Changed in 1975.*
[16] Gold, Gupta at 254.
[17] *Id*. at 232.
[18] *Id*. at 252.
[19] The Washington Post, January 1, 2005.
[20] Congressional Quarterly Today, January 5, 2005.
[21] "Snowe Weakens Frist's Hand for Senate 'Nuclear Option,'" Congressional Quarterly Today, February 16, 2005.

should cherish this blocking mechanism. And someone should puncture Republicans' current triumphalism by reminding them that someday they will again be in the minority."[22]

Ironically, the Gold/Gupta article's discussion of the "continuing body rejection" variant of the nuclear option bears out the fears of opponents – that using this maneuver on nominations is only the first step in remaking the Senate in the image of the House of Representatives. As the article makes perfectly clear, the previous unsuccessful attempts to reinvent the Senate as a non-continuing body have been inextricably linked to the "long and historic fight to establish majority rule in the United States Senate."[23]

In fact, the only successful adoption of this version of the nuclear option cited by the authors occurred in 1890 in the *U.S. House of Representatives*. Quoting an excerpt of the Senate debate on whether the Senate is a continuing body, the article notes "[F]rom 1860 to 1890, the House operated much as the Senate has operated….But in 1890 Speaker [Thomas] Reed ruled that at the beginning of each new Congress the House operates under general parliamentary law until new rules are adopted. Thereupon the House adopted new rules designed to permit efficient majority exercise of legislative functions, *and to prevent minority obstructions."*[24]

House majorities of both parties have never looked back from that day. In the modern House, the majority leadership and its Rules Committee decide unilaterally what legislation to take up, how long to debate it (usually an hour), and what amendments, if any, to make in order.

Absolute power in the U.S. House has now devolved into tyranny of the majority. Roll call votes are held open as long as necessary, in one instance in the 108th Congress for over three hours,[25] to fix the result. The leadership now routinely imposes "martial law" rules that force members to vote on bills hundreds of pages long only a few hours after they are written. "Closed" rules, which bar all amendments, are commonly used. The House is grimly efficient, but the price is bitter partisanship, non-existent comity, and no reasonable accommodation of the minority.

Successful exercise of the nuclear option would set the stage for the Republican Caucus in the Senate (or Democratic Caucus when it is in the majority) to operate as a de facto Senate "Rules Committee" which will pass judgment on the amount of debate the Senate will entertain on any question. The institution of the Senate as it has been since the founding of the Republic will simply cease to be.

Nuclear Option No. 2: An Attempt to "Render New Rules Precedent"

This version of the nuclear option is closest to what Senator Frist and other proponents have suggested they might seek to invoke. Under this version, Senator Frist would engineer a Senate vote on a parliamentary ruling concerning a specific vote and seek to establish by a narrow majority of the Senate a precedent that effectively overrides Standing Rule XXII of the Senate.

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[22] George Will, "Shock and Awe in the Senate," Newsweek, December 6, 2004.
[23] Gold, Gupta at 236, quoting Senator Herbert Lehman of New York.
[24] *Id*. at 238, quoting Senator Anderson. Emphasis added.
[25] This was the vote in the House of Representatives on November 22, 2003, on the conference report on H.R. 1, the Medicare prescription drug bill.

Rule XXII requires three-fifths of all Senators duly chosen and sworn to vote to end debate on "any measure, motion, other matter pending before the Senate."[26] This clearly includes judicial nominations. The Gold/Gupta article discusses a series of decisions taken by the Senate in 1977, 1979, 1980, and 1987 while Senator Byrd was Majority Leader and argues that they are "precedents that allowed a simple majority to change Senate procedures without altering the text of any Standing Rule."[27]

At best, these "precedents" stand for the proposition that the Senate has, at times, interpreted or reinterpreted its rules to expedite its business. However, it is also clear that none of them contemplate the dramatic shift in precedents and practices contemplated by the nuclear option.

By way of analogy, each of the precedents below can be viewed as closing "loopholes" in the existing rules that allowed Senators to delay the work of the Senate. The tactics foreclosed were loopholes in the sense that while the rules or prior practice of the Senate technically allowed them, they were unintended consequences of the ways the rules had previously been interpreted.

In contrast, the filibuster is not only allowed by the rules, it is expressly authorized in the rules, which specify that it takes "three-fifths of all Senators duly chosen and sworn to vote to end debate on "any measure, motion, other matter pending before the Senate." Under Rule V.2, the only means to change the rule is "as provided in [the Senate's] rules." Rule XXII requires a vote of two-thirds of the Senators present and voting to end debate on a change in the rules.

The filibuster is a longstanding Senate practice used time and time again. Indeed, it has become emblematic of the Senate. The Senate has never treated the filibuster as a loophole in the interpretation of its rules to be closed by a simple majority vote on a point of order.

1987 -- Senate rules limit explanations of failures to vote

On May 13, 1987, the Senate restricted the ability of Senators to delay completion of a roll call vote.[28] Unlike the nuclear option, the 1987 decision did not "amend" Senators' right to debate under rule XXII by creating a de facto simple majority cloture requirement. In fact, the ruling did not touch on Senators' inherent right to debate substantive questions before the Senate unless and until cloture is invoked. Rather, it simply stated that a Senator could not make an unlimited explanation of his reasons for not voting on a motion to approve the Journal.[29] And the Senate's decision was fully consistent with the text of Rule XII, which provided expressly that the question of whether a Senator could decline to vote "shall be decided without debate." This stands in direct contrast to Senator Frist's proposed nuclear option which would override, on a simple majority vote, the express text of Rule XXII by eliminating the filibuster on judicial nominations.

[26] Senate Rule XXII. 2.
[27] Gold, Gupta at 262.
[28] 133 Cong. Rec. S12,252-59 (1987)
[29] Senator Byrd clarified the limited precedential value of this point of order, noting that it was confined "only to that situation in which the Senate is trying to complete a vote on a motion to approve the Journal to date …..It is confined to that very narrow purpose." *Id.* at 12,257.

Specifically, on May 13, 1987, GOP Senators forced the Senate to take a series of votes on whether individual senators could decline to vote. At the end of a vote to approve the journal, a Senator addressed the chair and said he declined to vote. The Minority Leader (Dole) asked for a vote to permit the Senator not to vote. Then a Senator declined to vote on that question, and so on. Their goal was to prevent then-majority leader Robert Byrd from using the "window," available under Senate rules, to make a nondebatable motion to proceed to legislation in the first two hours of a new legislative day.[30]

During the midst of overlapping votes, Senator Dole took the floor to explain his reasons for not voting, as provided for under Rule XII. After several minutes, Senator Byrd called for the regular order, stating that Senator Dole had exercised his responsibility under Rule XII to explain his reason for not voting and that further explanation was simply for delay. Senator Dole demanded that the chair either allow him to continue or rule him out of order. The chair ruled him out of order and the Senate sustained the ruling of the chair on a vote of 55-45.[31] The Chair later noted that there was precedent for the Chair's action – a point of order raised in 1915.[32] In fact the delay had achieved its purpose and the two hour window had closed by the end of the parliamentary wrangling.

1980 – Senate allows consideration of nominations on the executive calendar out of the order submitted.

On March 5, 1980 the Senate adopted a precedent making a motion to proceed to a specific nomination nondebatable.[33] However, it did *not* restrict the ability to filibuster on the nomination itself, as Senator Byrd expressly noted.[34] Thus, unlike the nuclear option, it did not eliminate Rule XXII's requirement for a supermajority to invoke cloture and bring a nomination to a final vote. Therefore, the practical effect of the 1980 decision was to change the means of scheduling business in the Senate but not to erode the fundamental right to maintain a filibuster supported by 41 or more Senators. Finally, this decision did not contravene any Senate precedent or the text of rule XXII, as the chair noted; the written rule provided that a motion to go into executive session was nondebatable, it was simply silent on whether such a motion could name specific business.[35] In contrast, the nuclear option involves a slim majority disregarding the express text of rule XXII, the cloture rule.

Specifically, on March 5, then-majority Leader Robert Byrd moved that the Senate go into executive session for the consideration of a specific nomination which was not the first item of business on the Executive Calendar. Senator Helms raised a point of order against the motion, which the chair sustained. Under the chair's ruling, a Senator would have to first move that the Senate go into executive session (a nondebatable motion) and once in executive session, move to proceed to the specific nomination he wished the Senate to consider. The motion to proceed would be debatable. Senator Byrd appealed the ruling of the chair and the Senate voted to overturn the chair 38-54 (a yes vote would have sustained the chair's position).[36] The practical

[30] *Id*. at S12,256-57 (statement of Senator Byrd).
[31] *Id.* at S12,255.
[32] *Id.* at S12,258.
[33] 126 Cong. Rec. S4729-32 (1980)
[34] *Id.* at S4731
[35] *Id.* at S4730-31 (statement of Presiding Officer).
[36] *Id.* at S4732.

effect of the vote was to allow a nondebatable motion to proceed to a specific nomination. There was no ruling suggesting that the nomination itself was not subject to a filibuster.

1979 – the Senate restricts legislative amendments to appropriations bills.
On November 9th, 1979 the Senate adopted a precedent which restricted the ability of Senators to offer legislative amendments to appropriations bills. [37] This decision by the Senate is not a precedent for eliminating the filibuster for nominations through the nuclear option. The 1979 decision did not change an existing precedent of the Senate. Indeed, it appeared to implement rule XVI, which did (and does) forbid legislative amendments to appropriations bills. This is unlike the nuclear option which would in essence rewrite rule XXII (which does not provide for a lower cloture requirement for nominations) through a simple floor vote outside of the regular order. Finally, this decision did not restrict the right to debate in the Senate; it only affected the ability to offer certain amendments to particular legislation.

Furthermore, the 1979 precedent clearly followed the spirit behind defense of germaneness.[38] Under Senate rule XVI, legislative amendments to appropriations bills are generally out of order. However, Senate practice allows a Senator to raise a "defense of germaneness" to such a point of order which allows the Senate to vote on whether to allow the amendment. The defense of germaneness exists under the principle that it is in order for Senators to offer legislative amendments to legislation contained in House-passed appropriations bills.

1977 – Post cloture delaying tactics limited.
On October 3, 1977, the Senate established precedents governing post-cloture consideration of legislation in response to points of order raised by leaders of both parties.[39] None of these actions, however, represent a precedent for the nuclear option. Each of these decisions by the Senate limited tactics used only after a supermajority of the Senate *had already voted* (under the rules) to end a filibuster. In contrast, the nuclear option would short circuit the supermajority cloture requirement. None of the 1977 decisions restricted the right of Senators to wage a filibuster against a nominee or legislation before cloture is adopted. None affected the right to debate. Furthermore, unlike the nuclear option, none of the decisions conflict with the text of rule XXII. Indeed, the chair explicitly noted that the precedent relied on by Gold and Gupta was consistent with the purpose of rule XXII.[40]

The precedent relied on in the Gold/Gupta article involved restricting post cloture dilatory amendments. Specifically, the Vice President ruled, on a point of order raised by then-Majority Leader Robert Byrd, that the chair would take the initiative to rule out of order amendments in

[37] Specifically, on November 9th, 1979 a Senator offered a legislative amendment to a Defense Appropriations bill. Another member raised a point of order that the amendment was legislation on appropriations and the amendment's author sought to raise a defense of germaneness. Then-Majority Leader Robert Byrd raised a point of order that no defense of germaneness is possible if there is no House appropriations bill to which the amendment could be germane. The Chair stated that this was a question of first impression and submitted the question to the Senate. The Senate adopted Senator Byrd's position on a vote of 44-40. 125 Cong. Rec. S31,892-94 (1979).
[38] "'[T]he House having opened the door the Senate of the United States can walk through the door and pursue the field.'" Riddick's Senate Procedure at 165, quoting Vice President Marshall in a 1916 ruling articulating the theory behind the defense of germaneness.
[39] 123 Cong. Rec. S31,916-27 (1977).
[40] *Id.*, at S31,919.

post-cloture debate which are dilatory or out of order. This meant that Senators would not need to affirmatively raise points of order against amendments called up for consideration. Under Rule XXII, "dilatory" amendments and motions may not be offered. This ruling was appealed and the Senate sustained the position of the Vice President on a vote of 79-14.[41]

Finally, it should be noted that two of the points of order were themselves adopted by bipartisan supermajorities of the Senate (one by 79 Senators the other by 74), including the one raised by Senator Byrd. In fact, then-Republican Leader Howard Baker supported each of the points of order[42] and raised two of them himself. This is completely unlike the nuclear option which is sought to be imposed by a narrow partisan majority of the Senate.

Conclusion

Should Senator Frist seek to trigger the nuclear option over filibusters against judicial nominations in either of its two forms on the Senate floor, he will find no support in the precedents of the United States Senate.

Furthermore, the nuclear option does not merely represent a clear abuse of power and precedents of the Senate; by eliminating the filibuster for judicial nominations it would change the nature of the Senate and its role in our constitutional system. The Senate was designed to be the more deliberative body in Congress, a bulwark against partisan extremism, and a check on the President's appointment powers. This role is especially important with regard to lifetime appointments to the federal bench, where the filibuster is the only means available for a substantial minority in the Senate to stop a President whose party commands a slight Senate majority from placing extremists, ideologues or rank partisans on the Supreme Court. Without the filibuster, President Bush and 50 Senate Republicans could place anyone – Pat Robertson, John Ashcroft - on the Supreme Court; the remainder of the Senate would be powerless to stop them. Enabling a political party that controls the White House and the Senate to place a partisan stamp on the federal courts will undermine their independence and their historic role protecting our fundamental rights and liberties.

Eliminating the filibuster would be bad for the Senate, and disastrous for the federal courts and the country. Ultimately, history suggests that the Senate and the nation would be better served by the Administration and Senator Frist reaching across the aisle for bipartisan cooperation on nominations rather than reaching across the Capitol for strong-arm tactics from the U.S. House of Representatives.

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[41] *Id.* at S31,920. The two other points of order were raised by Senator Howard Baker, then the Republican Leader. One stated that the author of an amendment filed at the desk could recall the amendment as a matter of right (i.e. neither consent nor motion would be needed) during post-cloture consideration of legislation. The Senate adopted Senator Baker's position on a vote of 59-34. *Id.* at S31,923. The other stated that a request for the Senate to conduct business that it declines to conduct (when, for example, a request for the yeas and neas is declined) does not count as "transacting business" for the purpose of requesting a quorum call. The Senate adopted Senator's Baker's position on a vote of 74-21. *Id.* at S31,926.

[42] *See* e.g., *id.* at S 31,916 (statement of Senator Baker)